BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.	Rulemaking 01-09-001 (Filed September 6, 2001)
Order Instituting Investigation on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.	Investigation 01-09-002 (Filed September 6, 2001)

APPLICATION OF TOWARD UTILITY REFORM NETWORK AND OFFICE OF RATEPAYER ADVOCATES FOR REHEARING OF DECISION 03-10-088

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I. INTRODUCTION

On November 7, 2003, the California Public Utilities Commission (Commission) issued Decision (D.) 03-10-088. This decision concluded the Commission's investigation into the quality of telecommunications service offered in California by Verizon California Incorporated (Verizon) and SBC Pacific Bell (Pacific or SBC) under the new regulatory framework (NRF). With some qualification D.03-10-088 concludes that "Verizon offers very good service quality" and "Pacific offers generally good service quality… ." Rehearing of this decision is warranted and necessary because D.03-10-088 1) is based on its own extra-record analysis and thereby deprives parties of due process, including the right to cross examination; 2) admits evidence after the close of the proceeding in violation of parties due process rights and the Commission's own rules of practice and procedure; and 3) is arbitrary and capricious in that, among other things it

reaches conclusions based on claims that are contrary to the record facts, creates new standards for service quality performance, and because it selectively and arbitrarily excludes evidence submitted by TURN and ORA that impeaches evidence admitted after the proceeding was submitted.

II. D.03-10-088 DENIES PARTIES DUE PROCESS BY IMPROPERLY RELYING ON ANALYSES THAT ARE NOT PART OF THE PROCEEDING RECORD

A. Due Process Requires That Parties Be Afforded The Opportunity To Test The Analyses And Assumptions Supporting The Conclusions Contained in D.03-10-088

After noting that "GO 133-B defines specific measures associated with the quality of telecommunications services and sets standards for all but one," D.03-10-088 purports to "compare [Pacific's and Verizon's] performance against each standard and determine whether there are statistically significant trends in service quality over the measurement period."[1] Thus, rather than base its decision solely on the evidence presented by the parties to the proceeding, D.03-10-088 undertakes its own statistical analysis. While D.03-10-088 asserts that its decision is not dependent on the data upon which the analysis is based, the evidence introduced by the Commission does more than clarify the record. Indeed, the Commission-introduced evidence serves as the basis upon which the decision's most significant findings and conclusions are made. In point of fact the results of this analysis appear throughout D.03-10-088 and are mentioned in more than 20% of the findings of fact.[2] Thus the improper analysis and underlying data are integral to the decision.

The analysis D.03-10-088 performs on the data provided by Pacific and Verizon presents several issues and assumptions that ORA and other parties have a right to test

[1] D.03-10-088, p.11.

[2] This increases to more than 60% when findings of fact that are based on extra record analysis or averages are counted.

via cross-examination.[3] For example, in performing its own statistical analysis on Pacific's data "to determine where service quality had improved and/or declined during NRF, and to determine whether NRF regulation was correlated with declines in service quality" D.03-10-088 "estimated a regression of Pacific's performance on a linear time trend."[4] However, Pacific's witness Hauser specifically questioned whether his data should be used for the type of analysis undertaken in D.03-10-088. Mr. Hauser, in his reply testimony (page 9), stated that "…sample sizes used for these regressions are very small, and the linear time trend used may not be the most appropriate regression specification."[5] (Exhibit 2B:355, p.9, fn. 11.) In light of this acknowledgement, had Pacific's or any other witness sponsored the very same analysis presented in D.03-10-088, and reached conclusions comparable to those reached in D.03-10-088, ORA and other parties would have vigorously explored the propriety of such a presentation via detailed cross-examination. In particular, given the opportunity to conduct cross on this use of the data ORA would have explored the inherent limitations of time series analyses (such an analyses, while in some instances useful in determining whether significant change has occurred over time, are limited in that it cannot discriminate between actual change and measurement changes and also in that it glosses over or averages out irregular

[3] The information used in the analysis was not admitted into the record during the proceeding. This issue is addressed elsewhere herein.

[4] Calculations such as are found on pp. 97-98 of D.03-10-088 are repeated throughout D.03-10-088.

[5] D.03-10-088 used Pacific's statistical methodology to reach conclusions that cannot be reasonably derived from the methodology. This is because the decision uses the analysis borrowed from Pacific for a purpose other than what it was either designed or intended for. Pacific used its analysis to compare its performance to other carriers over time. The D.03-10-088 uses the same analysis to compare Verizon's performance over time to other carriers. However, the decision then uses the analysis to reach conclusions that go beyond the capability of the analysis by declaring that NRF regulation is not correlated with declines in service quality. The decision states that it "sought to determine where service quality had improved and/or declined during NRF, and to determine whether NRF regulation was correlated with declines in service quality."(D.03-10-088, p.5.) However, the analysis performed by the decision doesn't specifically address whether NRF regulation is correlated with service quality. In order to test whether NRF regulation is correlated with service quality, a valid regression analysis would require a "NRF variable" to test for any correlation between the presence or absence of a NRF program and changes in service quality. The analysis would also need to ensure that data for the reference group carriers identifies the time periods during which they operated under price cap regulation. The analysis performed by the decision does neither.

or inconsistent performance). ORA would also have established that there are several ways to analyze time series data, that statisticians can reasonably disagree on the most appropriate methods to use under different circumstances, and that the regression analysis performed is incapable of supporting the conclusions the decision has reached concerning the correlation between the NRF and service quality.[6] By presenting its own analysis D.03-10-088 deprives ORA of the opportunity to critically explore the analysis upon which it bases its decision. The decision then relies on its improper analysis to reach some of its most significant conclusions.[7]

Due process requires that parties be afforded the opportunity to test the analyses and assumptions supporting the findings contained in D.03-10-088. As noted in McLeod v. Board of Pension Commissioners, 14 Cal App.3d 23, 28; 94 Cal. Rptr. 58 (1970) "'[t]he right to cross-examine witnesses in quasi-judicial administrative proceedings is considered as fundamental an element of due process as it is in court trials.'"[8] As this is

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[6] As stated in Commissioner Lynch's dissent, " …it is simply not possible based on this record to isolate the impact of NRF regulation on service quality." (Lynch dissent, p. 11.)

[7] Important conclusions reached using this analysis include:

- "We find no evidence from Pacific's and Verizon's performance that supports the hypothesis that NRF regulation decreases the quality of customer service. (Finding of Fact (FoF) No. 67)
- "…it is not reasonable to attribute Pacific's poor performance to NRF regulation." (FoF No. 172)
- "…it is not reasonable to attribute Pacific's poorer performance in residential repeat out of service interval to NRF regulation." (FoF No. 187)
- "…it is not reasonable to attribute Pacific's poorer performance in residential initial 'all-other' repair interval to NRF regulation." (FoF No. 202)
- "…it is not reasonable to attribute Pacific's poorer performance in residential repeat "all-other" out of service interval to NRF regulation." (FoF No. 219)
- "…it is not reasonable to attribute Verizon's poorer performance to NRF regulation." (FoF No. 245)"

[8] McLeod v. Board of Pension Commissioners, 14 Cal App.3d 23, 28; 94 Cal. Rptr. 58 (1970), citing Witkin, Summary of California Law pp. 1919-1924, Constitutional Law, Sections 116-120 and 1969 Supp. to Vols. 3 and 4, pp. 995-999.

a quasi-judicial proceeding, ORA's right to cross-examination is a fundamental requirement of due process that cannot be abridged.[9]

Moreover, while ORA recognizes that Telocator Network of America v. F.C.C, 691 F.2d 525 (1982) confers upon the Commission the authority to use fundamental mathematics, such as tabulation and averaging, to assess statistics, the analysis in D.03-10-088 goes well beyond this limited authority. In point of fact, both the analysis undertaken and the due process claim differ markedly between Telocator and the current facts. Specifically, unlike Telocator wherein the Commission simply tabulated and averaged existing numbers, D.03-10-088 provides t-tests, estimates, multiple regression analyses, assumptions and hypotheses, each of which is reasonably subject to factual dispute and disagreement regarding the suitability of the analytical method and comparability of the data analyzed. With regard to due process, in Telocator the underlying statistics were properly entered into the record during the proceeding. In contrast, D.03-10-088 performs its advanced analysis on data that was not entered into the record during the proceeding and was therefore not in issue. Accordingly, while Telocator rightly affords administrative bodies leeway to summarize properly presented statistical evidence, it does not contemplate the kind of analytically complex, wholly independent analysis of extra record information performed in D.03-10-088 that is neither supported nor sponsored by a witness. Due process requires that parties be afforded an opportunity to test such an analysis by cross-examination prior to its acceptance or admission into the record. D.03-10-088's unilateral and untested undertaking of such an analysis deprives parties of their fundamental right to cross examination and unlawfully denies parties the opportunity to test, through cross-examination, the methodology and assumptions underlying the analysis. Accordingly, it is improper for D.03-10-088 to insert and rely upon this analysis for any of its conclusions.

[9] Mohilef v. Janocici, 51 Cal.App.4th 267, 300 (1996); Hannah v. Larche, 363 U.S. 420, 442 (1960).

B. D.03-10-088 Improperly Creates A Reference Group and Draws Conclusions Therefrom

D.03-10-088 relies on its own study of service quality to inform its opinion of Pacific and Verizon's performance under NRF. (D.03-10-088, pp. 60 – 108.) As set forth in D.03-10-088:

> For the measures reported in ARMIS 43-05, we examined Pacific and Verizon's performance over the years, and compared it with each other and with the performance of the reference group. The major results of our statistical analysis are reported in the tables that follow.

In addition to "replicating" an analysis using extra record information, D.03-10-088 also introduces an altogether new analysis. Specifically, the reference group D.03-10-088 used differs from that used by Pacific's Mr. Hauser. D.03-10-088 notes that "our analysis will include GTE/CA in both their reference group and as a company subject to analysis."[10] (D.03-10-088, p. 60, fn. 70.) However, because the referenced "study" is not part of the record, it cannot properly influence the Commission's decision.

In its comments on the ALJ Thomas' Proposed Decision (PD), SBC argued that "the Proposed Decision introduces new charts to compare SBC and Verizon's ARMIS data, [and] relying on new evidence untested by cross-examination is improper." (SBC Opening Comments on the PD, p.11.) While SBC's argument was not supported by the facts, because the charts criticized by SBC merely graphed the ARMIS data and G.O. 133-B data that are filed with the Commission, SBC was correct on the law. Consistent with SBC's recitation of the law, the statistical analysis contained in D.03-10-088, which presents and relies upon new facts that are untested by cross-examination to reach its conclusions, constitutes legal error. D.03-10-088 presents its own statistical analysis in

[10] ORA disputes but has been denied the opportunity to test the assertion in D.03-10-088 that "including GTE/CA in the reference group leads to comparisons that understate the performance of both Pacific and GTE/CA in comparison to a reference group of utilities outside of California." (D.03-10-088, p. 60, fn. 70.)

charts labeled "Trend in Verizon ARMIS Performance,"[11] "Comparison of Pacific ARMIS Performance with the Reference Group ARMIS Performance," "Comparison of Verizon ARMIS Performance with the Reference Group ARMIS Performance," and Comparison of Verizon ARMIS Performance with Pacific ARMIS Performance." [12] These analyses have not been subjected to cross-examination, are not part of the record, have not been deem valid by virtue of any prior Commission order, and work to deprive parties of their due process rights.

Furthermore, the comparisons with the reference group in D.03-10-088 utilize the regression methodology on data that even Pacific's witness Hauser did not attempt. The only regression comparison that Pacific's witness Hauser undertook between companies appears in attachment 52 of his reply testimony (Pacific/Hauser Ex.2B:355) where Pacific is compared to other SBC LECs using MCOT data (351 observations). A comparison among these companies at least has the virtue that the companies measure the performance statistics in the same way, as part of the MCOT reports. The comparative analysis used in D.03-10-088 goes way beyond what Pacific's witness sponsored, to institutionalize comparative regressions between companies absent any verification that their performance statistics are gathered in the same way.[13] This new leap in analytical methods has been undertaken completely off the record.

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[11] D.03-10-088, pp. 53.

[12] D.03-10-088, p. 54. The statistical analysis performed in D.03-10-088 on the reference group is not part of the evidentiary record. Indeed, attachment 5 of Mr. Hauser's Phase 2B Reply Testimony doesn't perform a statistical analyses on Verizon.

[13] See also discussion in section IV(B)(1) below.

III. D.03-10-088 VIOLATES PARTIES' DUE PROCESS RIGHTS BY RELYING ON EVIDENCE THAT WAS IMPROPERLY ADMITTED AFTER HEARINGS

A. The Evidence at Issue

D.03-10-088 notes that by email, on July 17, 2003, the Assigned Commissioner solicited comments on the possibility of her "setting aside the submission to accept into the record four items of evidence… ." The four items at issue were:

- Work-papers associated with the analysis of trends and reference group comparisons;
- charts and tables showing Verizon's GO 133-B results on a monthly basis (submitted by Verizon on or about July 16, 2003, after the close of hearings);
- charts and tables showing Pacific's GO 133-B results on a monthly basis and;
- Mr. Hauser's workpapers supporting the ARMIS attachments to his opening and reply testimony. (D.03-10-088, p. 188.)

The July 17, 2003 email explained that the Assigned Commissioner was considering setting aside submission because "[c]ertain materials, if included in the record of this proceeding, would make the calculations of alternate proposed decision simpler to follow and/or verify." In addition to repeating this statement, D.03-10-088 asserts that "[a]lthough the record in this proceeding is in no way deficient or dependent on this data, we believe that admitting the evidence will enable the parties to better understand both the statistical methodology and the analysis that was used throughout this decision." However, these statements are contradicted by the reliance on the information in the analyses performed, findings, and conclusions reached in D.03-10-088. For example, the work-papers associated with the analysis contained in D.03-10-088 purport to assess linear trends in the GO 133-B data.[14] More than twelve of D.03-10-088's Findings of Fact are based on the results of this analysis. Equally problematic are

[14] D.03-10-088, pp. 31-52.

Mr. Hauser's workpapers offered in support of the ARMIS attachments to his opening and reply testimony. These workpapers form the underpinnings of D.03-10-088's creation of a "reference group" with which Verizon's and Pacific's service quality is compared. More than seventy-five of D.03-10-088's Findings of Fact are based on the results of these comparisons.[15] Accordingly, while the record is, arguably, not dependent on the extra record evidence, the dicta, findings of fact, and conclusions of law found in D.03-10-088 are very much dependent on the extra record evidence.

In its response to the July 17, 2003 e-mail ORA noted that the Commission's sua sponte setting aside submission was at odds with the California Public Utilities Commission Rules of Practice and Procedure (Rules). Specifically, ORA argued that the Commission's reopening the proceeding to take the aforementioned materials into evidence would violate rules 84, 45(f), 46, and 69(b) of the Commission's Rules of Practice and Procedure.[16] D.03-10-088 wrongly rejects ORA's arguments.

B. Rules 84, 45(f) and 46

Rule 84 is the exclusive means by which submission may be set aside and the proceeding reopened under the California Public Utilities Commission Rules of Practice and Procedure.[17] By its terms, Rule 84 explicitly limits the availability of this procedure to parties. Specifically, Rule 84 states:

> After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence, or for consideration of a settlement or

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[15] See Findings of Fact Nos. 87, 89, 90, 92, 94, 97, 98, 104, 105, 108, 109, 115, 116, 119, 120, 126, 127, 130, 131, 138, 139, 140, 143, 144, 150, 151, 152, 156, 163, 164, 165, 168, 169, 172, 174, 178, 179, 180, 183, 184, 187, 189, 190, 193, 194, 195, 198, 199, 202, 204, 209, 210, 212, 215, 216, 219, 221, 223, 227, 228, 232, 233, 236, 237, 240, 241, 243, 250, 253, 254, 255, 258, 259, 286, and Conclusions of Law Nos. 10 and 22.

[16] See July 24, 2003 Comments of the Office Of Ratepayer Advocates on Commissioner Kennedy's Proposal to Set Aside Submission to Accept Additional Items into the Record.

[17] See discussion of Rule 63 below. Neither D.03-10-088 nor the decisions cited therein identify any authority that supports the Commission's setting aside submission sua sponte.

> stipulation under Article 13.5. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced. (Emphasis added.)

That the hearings on this matter had concluded, that a decision had yet to issue, that the Commission was not a party, and that no petition to set aside submission and reopen the proceeding was either filed or served are uncontroverted. In the face of these uncontroverted facts, D.03-10-088 first asserts that the Commission has in past cases set aside submission in the absence of a petition from a party.[18] As an initial matter, ORA notes that the axiom that prior violations do not excuse current ones applies to the Commission as well as the utilities it regulates. Therefore, the fact that ALJs have twice reopened proceedings does not change the fact that Rule 84 prohibits the Commission's sua sponte setting aside submission and reopening a proceeding.

Moreover, the question of whether the Commission can properly sua sponte reopen a proceeding was not addressed in the cases referenced by D.03-10-088. Specifically, in neither D.01-04-013 nor the D.03-03-023 did any party object to the requested additional proceedings. Since no party in Garrapata raised the issue of whether it was appropriate to reopen the proceeding, the legality of that action was not addressed. In contrast, in this proceeding ORA and TURN have made repeated and timely challenges to this practice.

Indeed, it may be the case that the ALJ' sua sponte setting aside submission wasn't challenged in D.01-04-013 or D.03-03-023 because parties in those proceedings were afforded the opportunity to make substantive comments after the proceeding was reopened. As set forth in D.03-03-023 "the ruling set aside submission of Application

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[18] D.03-10-088, p. 190, citing Application of San Diego Gas & Electric Company (U 902-E) for Approval of Utility Retained Generation Cost Recovery Mechanism, D.03-03-023, 2003 Cal. PCU LEXIS 182 *1-2 (March 13, 2003) and Carol Fisch v. Garrapata Water Co., Inc., D.01-04-013, 2001 Cal. PUC LEXIS 545 *3-4 (April 10, 2001).

(A.) 02-01-015 to take comments regarding any modifications to SGD&E's proposal that might be appropriate… ." Though D.03-10-088 asserts that the July 17, 2003 "e-mail message provided a cycle for comments and replies," it fails to acknowledge that these comments were to address the limited procedural question of whether "setting aside the submission to accept into the record four items of evidence" was permissible and appropriate.[19] Indeed, the statement contained in footnote #308 was made in response to an exclusively procedural issue raised by ORA, namely that the July 17, 2003, email does not satisfy the requirements of Rules 46 and 45.[20] Accordingly, D.03-10-088's reliance on D.03-03-023 and D.01-04-013 to support its sua sponte setting aside the proceeding and provide relief from the requirements of Rule 84 is again misplaced.[21]

D.03-10-088 next cites Rule 63 as authorizing "the presiding officer to 'take such other action as may be necessary and appropriate to the discharge of his or her duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.'" (D.03-10-088, pp. 190-191.) D.03-10-088 then asserts that, "if the presiding office [sic] has this authority, so does the assigned Commissioner." ORA does not take issue with the proposition that the assigned Commissioner's authority is comparable to that of the presiding officer. ORA does however note that Rule 63 does not purport to free the Commission of its obligation to comply with other Commission Rules and statutes. Pursuant to Rule 63, whatever action the presiding officer or the Commission deems necessary for the discharge of their duties, must be consistent "with the rules and policies of the Commission." Accordingly, Rule

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[19] Without any explanation of how this opportunity for procedural comments satisfies due process requirement, D.03-10-088 asserts that: "By inviting the parties to submit comments on whether the matter should be set aside and additional evidence received, Mr. Sullivan's email afforded ORA a sufficient opportunity to respond." (D.03-10-088, p.188, fn. 308. Emphasis added.)

[20] ORA has asserted and continues to assert that because Rule 84 requires a petition to be filed to reopen a proceeding, Rule 46 which establishes that petitions are functionally equivalent to motions, and Rule 45 which establishes a format for motions that is inconsistent with the July 17, 2003 email, are also applicable and violated by the Commission's actions.

[21] D.03-10-088, p. 188.

63 does not and cannot provide relief from the Commission's (or a presiding officer's) sua sponte setting aside submission in contravention of Rule 84.[22]

C. Rule 69(b)

D.03-10-088 notes ORA's contention that Rule 69(b) provides that no documents or records of a public utility or person or corporation which purport to be statements of fact shall be admitted into evidence unless such document or records have been certified as true and correct by the person preparing or in charge of preparing them. D.03-10-088 attempts to dismisses ORA's claim on the assertion that:

> Rule 69(b) does not require certification of the items of evidence. In particular, these items are offered by the Commission to clarify this record, not by the parties to the proceeding, and are thus explicitly excluded from the provisions of Rule 69.[23]

Absent from D.03-10-088's analysis of Rule 69(b) is a reference to any supporting statute, case law or other authority. Thus, D.03-10-088 appears to assert, without any supporting authority, that Rule 69(b) does not apply where items are offered in evidence by the Commission (rather than a party) to clarify the record. Contrary to this assertion, the language of Rule 69(b) provides no exception, either explicit or implicit, for evidence entered into the record by the Commission (rather than a party), for any reason.

Rule 69(b) of the California Public Utilities Commission Rules of Practice and Procedure provides:

> No documents or records of a public utility or person or corporation which purport to be statements of fact shall be admitted into evidence or shall serve as any basis for the testimony of any witness unless such document or records have been certified under penalty of perjury by the person preparing or in charge of preparing them as being true and correct… . If certification pursuant to this section is not

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[22] Rule 63 cannot be interpreted as allowing the Commission to circumvent the requirements of Rule 45(f), 46, or 69(b).

[23] D.03-10-088, p.191.

> possible for any reason, the documents or records shall not be admitted into evidence unless admissible under the Evidence Code.

On its face, it is the question of who prepared the document or record and whether it purports be a statement of facts, rather than who offers the document for admission triggers the application of Rule 69(b).

Although it is the Commission that now offers the documents for admission, it is undisputed that, with the likely exception of the workpapers associated with the analysis of trends and reference group comparisons, the Commission did not prepare these documents. Specifically Mr. Hauser's workpapers supporting the ARMIS attachments to his opening and reply testimony were prepared for and by Pacific (a public utility and corporation). Apparently the workpapers associated with the analysis of trends and reference group comparisons were developed by Mr. Sullivan.[24] Verizon (a public utility and corporation) prepared the charts and tables that purport to show as facts, Verizon's GO 133-B results on a monthly basis. Pacific (a public utility and corporation) prepared the charts and tables that purport to show Pacific's GO 133-B results on a monthly basis. Since these are documents or records of a public utility or person or corporation that purport to be statements of fact, Rule 69(b) prohibits their being admitted into evidence absent certification.

Though D.03-10-088 asserts that "the items of evidence proposed for admission here constitute exactly that GO 133-B and ARMIS data that the Commission has declared reliable and which the Commission has formerly taken official notice" the fact is, these are not said data.[25] (D.03-10-088, p. 191 (emphasis added).)

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[24] These are not Commission workpapers. Whether Mr. Sullivan could certify the workpapers is not addressed herein since he has not offered to do so.

[25] Specifically, the monthly G.O. 133-B data for Verizon's data is different from Verizon's representation of its data as submitted in the record. In its comments on the Proposal To Set Aside Submission For Limited Supplementation Of The Record, Verizon asserted that "On February 15, 2002, it provided this information, which is the same information in the Verizon charts and tables provided in response to the recent data request." However, the data that Pacific and Verizon provided in response to Mr. Sullivan's verbal data request and the data upon which the Commission relies to reach its conclusions is not the same data that was filed with the TD.

Neither the workpapers associated with the analysis of trends and reference group comparisons nor Mr. Hauser's workpapers which support the attachments to his opening and reply testimony can reasonably be considered to constitute the GO 133-B and ARMIS data. The workpapers consist of, among other things, alterations of the data via calculations that include estimated coefficient values, T-statistics and R-squared tests. In addition, in contrast to the GO 133-B and ARMIS data that the Commission noticed in D.01-12-021 the information now entered into the record was prepared by the utilities. Unlike the actual ARMIS data the underlying ARMIS data for the reference group companies used in the decision's time trend and regression analyses also contains questionable, unreliable and erroneous information.[26] Indeed, there is no evidence or testimony in the record that verifies the assertion in D.03-10-088 that this data constitutes the same GO 133-B and ARMIS data that is on file with the Commission. In fact, the claim begs the question: If the data is the same (and ignoring other potential violations of due process and Commission rules), why didn't D.03-10-088 simply take notice of the data? The answer lies in Rule 73, which provides that "[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of California." California evidence code § 452 identifies those matters that may be judicially noticed. The four items at issue do not fall within §452 of the California Evidence Code. Accordingly, the items are inappropriate for judicial notice and cannot be treated as being the same as the GO 133-B and ARMIS data that the Commission took official notice of in D.01-12-021.

Finally, D.03-10-088 argues:[27]

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[26] **I**n particular, Mr. Hauser's workpapers containing the ARMIS data for reference group companies that were placed into evidence by the Assigned Commissioner contain erroneous and unreliable data, and lack sufficient explanation. For example, Mr. Hauser's workpapers contain the notation that "Average intervals changed from -7777 to '.'" However, there is no explanation as to why a value that can't be less than "0" would ever be reported as "-7777." Mr. Hauser's workpapers contain another notation that "All 'N/A' and 0 values changed to '.'" There is also no explanation as to whether "N/A" means "not available" or not applicable", or why a value would not be available and/or not applicable.

[27] D.03-10-088's final assertion is that "ORA argued that we should base our analysis on monthly results, not yearly. We have granted ORA's request, and find it difficult to understand why it now objects." What ORA objected to, in advance of D.03-10-088's being issued, was the proposed finding

> … the proposed items will not deprive ORA of its due process or cross-examination rights. In particular, both the data, the methodology of Mr. Hauser which our analysis follows, and Mr. Hauser's workpapers were fully available to ORA for cross-examination in the proceeding."[28]

This assertion is without legal foundation and contrary to law. ORA is entitled to cross-examination not just on the underlying workpapers, but on the analyses and conclusions derived therefrom. Assuming arguendo that Mr. Hauser could be cross-examined on the workpapers, the fact remains that he did not perform the trend analysis done by Mr. Sullivan. Cross-examining Mr. Hauser about the analysis or the appropriateness of using his workpapers, though essential, would be of limited value and not satisfy due process requirements.[29] In addition, the fact that Mr. Sullivan's analysis utilized estimates both speaks to the impossibility of cross-examining Mr. Hauser on it (ORA would have had to predict which among a near infinite number of values Mr. Sullivan would use) and the need to have cross-examination on the analysis (to among other things ascertain why the selected estimated values were used, why various assumptions were made, and if the analytical methods used were appropriate). Reasonable cross-examination could not be had from Mr. Hauser and no one from the Assigned Commissioner's office (that placed the evidence into the record) has been made available for cross-examination on these issues. Parties have not therefore been provided the requisite due process opportunity to conduct cross-examination and the record lacks foundation for entry of the documents, analyses, and conclusions reached there from.

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that SBC and Verizon met the standard of not falling below the requisite level of performance during the period of time when the evidence conclusively showed that both utilities had months wherein they did not meet the applicable standard. (Revised Opening Comments of The Office Of Ratepayer Advocates On The Proposed Alternate Decision Of Commissioners Kennedy and Peevey (Mailed 6/11/03), pp. 14-16) ORA did not, and does not, in any way endorse or urge the Commission's extra-record analysis. As stated at page 191 this is a factual issue and as such is not addressed here. The related legal question of whether the Commission applied the proper standard is addressed elsewhere herein.

[28] D.03-10-088, p. 191.

[29] Indeed, to the extent that Mr. Hauser's testimony addresses this issue, he is on record as stating that such an analysis would be inappropriate. (SBC/Hauser Reply Testimony, p.5.)

As a result of the process used by the Commission to introduce this evidence into the record, parties have not had an opportunity to test, via cross-examination on the record, the inconsistencies in the data introduced by the Assigned Commissioner and relied upon by D.03-10-088 to conclude that carriers' performance exceeded the minimum standards established by G.O. 133-B and/or was satisfactory when compared to reference group companies.

IV. D.03-10-088 IS ARBITRARY AND CAPRICIOUS

A. D.03-10-088's Selective Admission and Non-admission of Documents is Arbitrary and Capricious

In addition to informing parties that Commissioner Kennedy was considering setting aside the record and providing for comments and reply comments on this possibility, the July 17, 2003, email from Mr. Sullivan informed parties that they could suggest other items for inclusion into the record. With regard to evidence offered for entry into the record by TURN and ORA, D.03-10-088 states:

> … we reject the additional material offered by TURN and by ORA. TURN"s anaylsis has an arbitrary cut-off date for its analysis, and including this in the record makes little sense for we would give it no weight. ORA has provided no explanation as to why its proposed material should be added to the record. Moreover, we note that it had full opportunity to move this information into evidence throughout the proceeding and has made no case as to why we should do so now.

However, the July 17, 2003 email doesn't require, as a condition of acceptance, an explanation of why proffered documents should be admitted.[30] Moreover, this requirement was applied differently to evidence prepared by ORA and TURN than to that of the utilities.

[30] In relevant part, the July 17, 2003 email states, "[p]arties may also suggest other items for inclusion into the record, as well as the reasons for their proposals." By virtue of the term "may" this email appears to make submission of other items and reasons therefore optional.

For example, though three of the four items received into evidence in D.03-10-088 were prepared by the utilities (two by SBC, one by Verizon), these parties were not required to provide an explanation as to why their materials should be added to the record. Thus, the now required explanation has only been applied to evidence proffered by ORA (and apparently TURN). Similarly, the acknowledgment that ORA's evidence was excluded because ORA had a prior opportunity to proffer the evidence has likewise been applied selectively. The fact is three of the four documents admitted after the proceeding was reopened could have been proffered into evidence by parties when the proceeding was open.[31] Finally, D.03-10-088 claims to exclude the analysis proffered by TURN because it has an arbitrary cut-off date (and asserts that it would be given little weight).[32] D.03-10-088 ignores the fact that evidence it includes and gives substantial weight to also has arbitrary cut-off dates.[33]

Accordingly, in refusing to admit documents offered into the record by TURN and ORA D.03-10-088 applies standards and requirements to ORA and TURN that were not applied to other party's evidence. D.03-10-088 is therefore arbitrary and capricious.

B. D.03-10-088's Analyses Are Arbitrary and Capricious

1. D.03-10-088's Inter-Utility Comparisons Are Arbitrary

Inter-Utility comparisons such as are performed in D.03-10-088 have repeatedly been found to be inappropriate. In D. 01-12-021 this Commission stated:

> ORA attempts to compare Pacific's ARMIS data with that reported by other carriers to show that Pacific's repair intervals are generally longer than those of any other carrier. Pacific points out that its data are not comparable to the data

[31] As noted above, during the proceeding SBC objected to entry of the actual data that D.03-10-088 claims least one of the admitted documents "constitutes".

[32] The cut-off date is not arbitrary, it supports TURN's thesis that the worsening of Pacific's repair performance through 1998 was largely resolved by Commission action in a complaint case filed by ORA in 2000, resulting in a repair standard for Pacific subject to fines. (D.01-12-021.)

[33] For example D.03-10-088's analysis and discussion of trouble report service answering time (TRSAT) discusses performance since 1999. (D.03-10-088, p. 39.)

> for other companies because the processes used by the companies to issue trouble reports differ, which affects the out-of-service intervals. We concur with Pacific that it is not possible to make meaningful comparisons between Pacific and other carriers using ARMIS data.[34]

Consistent with the above, in C.00-11-018 Pacific itself argued against this practice on the claim that, to compare Pacific with other operating companies in terms of repair duration, it is critical to also compare the processes by which companies handle trouble reports.[35] For example, as a long-standing operational practice SBC only takes a trouble report on customer calls where there is a specific repair issue.[36] In contrast, other Regional Bell Operating Companies (RBOCs) take a trouble report on every phone call into their repair centers.[37] This difference in how ARMIS reports are generated produces the impression that Pacific has many fewer trouble reports per line than the other RBOCs.

Indeed, D.03-10-088 itself notes that, given the myriad of problems of inter-company comparisons, "…it is difficult to compare the performance of one company with another."[38] In spite of this acknowledgment, and in contravention of the prior Commission decision, D.03-10-088 undertakes and substantially relies on just such comparisons. Even more problematic is the fact that as a result of these comparisons D.03-10-088 concludes that, "[i]t is reasonable to conclude that a utility that earns better scores on ARMIS service quality measures than the scores of a reference group that includes the major large utilities is providing good service quality.[39] In effect, in reaching this conclusion of law, D.03-10-088 would establish both that admittedly flawed

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[34] Decision 01-12-021, December 11, 2001, Footnote 17.

[35] C.00-11-018, Exhibit 31, Corrected Prepared Testimony of Rick Resnick, on Behalf of Pacific Bell Telephone Company, p. 12.

[36] Using this approach, for the year 2000, 74% of the calls received by SBC's Customer Service Bureau did not result in a trouble ticket. *Id*.

[37] Id.

[38] D.03-10-088, p. 9-10.

[39] D.03-10-088, p. 234, Conclusion of Law #22.

comparisons of utilities are proper, and that rather than existing standards, the relevant inquiry is how a utility performs relative to other utilities. As noted in the dissent of Commissioner Lynch, this is poor policy and represents a ceding of regulatory authority by the Commission.[40] Moreover, given the effect of reporting differences on the ARMIS measures, SBC's rejection of the approach, and the Commission's prior decision relating to just such a comparison, it is arbitrary and capricious.[41]

2. The Estimates In The Statistical Analysis Are Arbitrary

D.03-10-088 purports to utilize statistical methods to analyze the time trend in Pacific's and Verizon's reported measures. With regard to the trend analysis performed, D.03-10-088 repeatedly states that:

> To determine whether there is a significant time trend in Pacific's performance, we derived the coefficients that estimate how Pacific's performance varies over time. In particular, we estimate a regression of Pacific's performance on a linear time trend, $y=\alpha + Bx$, where y is the performance in a given year and x is the year.

Not only this is the only explanation of the analysis given, but also, no explanation or justification is given for why the formula, type of analysis (linear trend), or particular estimates were used.[42] As stated above, no witness presented a regression analysis between the NRF utilities and the comparison group of 10 utilities, or between pacific and Verizon. Nor does D.03-10-088 provide reference to any Commission proceeding, statute, or case law that establishes the propriety of the analysis performed. Absent

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[40] D.03-10-088, dissent of Commissioner Lynch, p.6 (mailed December 3, 2003).

[41] See D.01-12-021

[42] Though it is unclear exactly who performed these analyses, on or about July 8, 2003, Mr. Tim Sullivan, advisor to the Assigned Commissioner, provided parties copies of the workpapers related to these calculations. Among other things, these workpapers do not contain all the source data for the calculations, an explanation for the estimates used, or any consideration of the propriety of the type of analysis performed.

explanation or justification, the analysis, and in particular the estimates therein, can only be considered arbitrary and improper.

C. D.03-10-088 Arbitrarily Creates New, More Lenient GO 133-B Standards in This Proceeding

D.03-10-088's finding of satisfactory performance based on annual averages violates P.U. Code § 1709 in that it improperly applies the standard set out in GO 133-B. Specifically, section 3.8(e) of GO 133-B establishes that the applicable standard for reporting units is "not meeting the reporting service level for any month."[43] (Emphasis added.) The plain language of the section establishes that where a utility does not meet the minimum reporting service level for any month, the utility has failed to meet the standard. Contrary to this requirement, with regard to the GO 133-B standards D.03-10-088 alternates between findings based on annual averages which includes statistical tests that purport to assess whether there's a significant time trend, and findings based on the number of months for which the standard was met out of the total number of months (or percentage of months) in the period under review.[44] By basing its findings on the annual average and statistic, or percentage of months meeting minimum service levels, D.03-10-088 arbitrarily and improperly adopts different, more lenient, standards than those established by GO 133-B.[45]

This impropriety pervades D.03-10-088's GO 133-B analysis.[46] By way of example, with regard to Verizon's Trouble Report Answering Service Time (TRSAT) performance, D.03-10-088 states "[o]n the average we find that Verizon has an

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[43] Section 2.2 (Standards of Service – Description of Reporting Levels) of G.O. 133-B specifies that reporting levels …"have been established so as to indicate units which are not meeting the standard thereby providing an indication of inadequate service."

[44] See e.g. Findings of Fact Nos. 32 – 51, 54, 55, 59, and 60.

[45] Consistent with D.03-10-088's acknowledgement that changes to reporting requirements are the topic of another phase of this proceeding (p. 9), there is currently no record to support the Commission's changing the GO 133-B reporting requirements in this proceeding.

[46] ORA agrees that in those instances wherein the standard was met in every month, findings based on the relative number of months does not deviate from the applicable standard.

improving trend in this area."[47] However, this finding masks the fact that Verizon failed to meet the GO 133-B minimum standards on numerous occasions during the period under review.[48] These divergent results are caused by D.03-10-088's arbitrary use of averages and percentages. Similarly, with regard to SBC's Business Office Answering Time (BOAT) data, D.03-10-088 improperly finds that "…Pacific's performance has met the standard since 1997." However, Pacific failed to meet the minimum standard in January 1997, March 1997, and July 1998.[49] As with TRSAT, D.03-10-088's reliance on an annual average to find that "Pacific's [BOAT] performance has met the standard" violates P.U. Code §1708. Again, D.03-10-088 improperly modifies the standard set out in G.O. 133-B, Section 3.9(e) that establishes the standard applicable to reporting units as "not meeting the reporting service level for any month." (Emphasis added.) In addition, D.03-10-088 says that Pacific met the standard, even though the preceding paragraph says "…this measure has been highly unstable during the reporting period, making it particularly difficult to draw any conclusion concerning the trend in performance." Similarly, with regard to Pacific's business office answering time (BOAT), though it was established that Pacific failed to meet the requisite standard on 67 separate occasions, D.03-10-088's arbitrary annual and percentage of months basis lead to the finding that "Pacific met the standard in 1994, 1997-2001."[50] Also, in spite of the fact that on this same measure Verizon failed to meet the minimum standards on 18 separate occasions, D.03-10-088 finds that Verizon "showed statistically significantly improvement."[51]

These findings lead to D.03-10-088's concluding that "[I]t is reasonable to conclude that meeting GO 133-B standards adopted by the Commission is a sign that a

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[47] D.03-10-088, p. 42, and see Finding of Fact #64, p. 200. Moreover, D.03-10-088 concludes that if the G.O. 133B minimum standard is met, then service quality is per se "good." (Conclusion of Law No. 21). However, neither the proceeding nor the decision provide a definition of what is "good".

[48] ORA/Piiru, Exh. 2B:138 at 6.

[49] TURN/Schilberg, Exh.2B:507, p.16.

[50] D.03-10-088, 199, fn.61.

carrier is providing good service quality. Even if we ignore the fact that D.03-10-088's findings in this regard are improper, the fact that a utility meets what is by definition the minimum acceptable level of service to be considered "adequate" cannot reasonably be construed as showing that the utility provided good (rather than simply adequate) service. The findings resulting from D.03-10-088's statistical analysis are at odds with the established standards, and the conclusions reached therein are unfounded, therefore D.03-10-088 is again arbitrary and capricious.

D. D.03-10-088 Arbitrarily Excuses SBC's Failure To File PA 02-03 Monitoring Reports

D.03-10-088 claims P.A.02-03 is confusing. The sole support cited by D.03-10-088 for this contention is the staff's Monitoring Report Assessment, filed on May 1, 1992, and SBC's unsupported assertion that "the P.A. 02-03 report refers only to surveys initiated by the Commission." (D.03-10-088, pp. 117 and 118, respectively.) Based on these assertions D.03-10-088 finds "no reason to believe that anything other than a good-faith confusion has led to the lack of reports to be filed under P.A. 02-03." (D.03-10-088, p. 119.) D.03-10-088's finding is contrary to law and the facts of record.

D.03-10-088 states that "from the record of this proceeding, it is unclear whether any other survey data exist." (D.03-10-088, p. 118.) In contravention of this statement, the record shows that Overland Consulting, the Commission's own auditors, found information showing Pacific used a third-party firm to do these surveys.[52] Moreover, though SBC has alternately refused to provide the surveys, claimed that it need not file the reports, and implied that the Commission has somehow waived its authority to obtain these reports, SBC has never claimed that it does not have the surveys at issue.[53]

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[51] D.03-10-088, p.52 and p. 200, fn.65.

[52] Exh.2B:404, p. 21-19, citing responses to OC-497.

[53] Though ORA has repeatedly point out that SBC has never claimed that it doesn't have the surveys requested (See ORA Phase 2B Opening Brief), D.03-10-088 asserts that the question of "whether Pacific has provided the Commission all the data that it has" has yet to be addressed.

D.03-10-088 excuses Pacific's failure to file certain surveys and on the basis of Pacific's selective survey filing finds Pacific performed well, on the assertion that P.A. 02-03 is confusing. However, D.03-10-088 offers no legal or factual basis for its assertion. Rather than identify some inherent confusion in the reporting requirements, D.03-10-088 provides quotes from the staff prepared *New Regulatory Framework Monitoring Report Assessment* (I.87-11-033) and asserts that the description of the customer surveys Pacific is required to file under P.A. 02-03 appears to accurately describe the data submitted by Pacific under P.A. 02-04, while the reports submitted by Pacific under P.A. 02-04 do not appear to meet the description staff provided of such reports.[54] This places the proverbial 'cart before the ox': In effect D.03-10-088 finds confusion in the reporting requirement simply because Pacific's filing do not match the requirements. Rather than the confusion alleged by D.03-10-088, that Pacific's filing do not comport with the plain language in the staff reports more reasonably indicates that Pacific didn't comply with the stated reporting requirements, as alleged by ORA and the Commission's auditors.

D.03-10-088 then links its cart driven ox to Pacific's claim "that the P.A. 02-03 report refers only to surveys initiated by the Commission."[55] However, neither Pacific nor D.03-10-088 cite any reference from which this conclusion might be reasonably drawn. Indeed, the language in the staff report quoted in D.03-10-088 specifically refers to "surveys conducted by the Company Measures and Statistics organization at Pacific Bell" and those surveys "conducted through the Corporate Research organization at Pacific Bell… ."[56] Finally, D.03-10-088 asserts that "ORA only minimally addressed" the P.A. 20-04 data and claims that "the failure of ORA and TURN's to address this survey data is disappointing and confirms our independent judgment that Pacific's surveys are accurate." (D.03-10-088, p. 137.) Setting aside the fact that D.03-10-088

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[54] D.03-10-088, pp. 136-137.

[55] D.03-10-088, p. 136.

[56] D.03-10-088, pp. 135-136.

ignores the Commission's own established principle against construing silence as agreement, the fact is, the issue presented wasn't whether the (P.A. 02-04) data provided was accurate, but rather whether all the data (including the P.A. 02-03 data) was disclosed and/or filed. Absent support for SBC's interpretation, D.03-10-088's finding that good-faith confusion led to the lack of reports being filed under P.A. 02-03 is arbitrary and capricious.

E. D.03-10-088 Arbitrarily and Selectively Weighs Parties' Survey Results

D.03-10-088 acknowledges that "at the Commission's direction, ORA's witness Dr. Marek Kanter readministered a survey of Pacific's customers based on one ORA conducted in 1995," that had ORA undertaken the methodological recommendations made by Pacific "it would have lost the ability to do a fair comparison," and that "the bias that Pacific's witness purports to exist is not powerful enough to explain away the general finding of the ORA survey: that there has been a diminishment in customer's perception of Pacific's service quality." D.03-10-088 nonetheless dismisses ORA's survey on the claim that "the sharp drop in the response rate in the 2001 survey from that of 1995 limits our ability to draw conclusions from the survey with statistical confidence."[57] Even more problematic than the fact that D.03-10-088 reaches this conclusion without reference to or consideration of ORA's evidence of record showing that ORA's conclusions were in fact statistically significant, is the fact that in reaching this conclusion D.03-10-088 applies a different, more strict standard to evidence offered by ORA than it applies to the evidence proffered by Pacific.

While ORA's survey was dismissed on the basis of D.03-10-088's questioning its statistical significance, Pacific's evidence was accepted inspite of the fact that the Commission has repeatedly found such evidence unreliable. Indeed, though the Commission has repeatedly determined (and Pacific itself has argued) that inter-company comparisons between Pacific and other carriers are of little value, all the surveys that

[57] D.03-10-088, p. 124, noting that "the overall response rate in the 2001 ORA survey was 12.1%. It was 28.1% in 1995.

D.03-10-088 gives weight to make such comparisons.[58] (see J.D. Power Survey, D.03-10-088, p. 125-127; IDC Survey – Pacific, D.03-10-088, p. 127-128; and Market Insights, D.03-10-088, p. 128-133.) Moreover, in addition to this general flaw, D.03-10-088 gives weight to these surveys even though it acknowledged that each survey has its particular flaw. For example, with regard to the J.D. Power survey, D.03-10-088 finds that: the survey "did not 'measure satisfaction with recent service events with Pacific (e.g., installations or repairs), but rather provided a general measure of satisfaction with overall customer service and its aspects;'" that "the survey also included several factors that we consider peripheral to a true assessment of service quality;" and that "Pacific submitted little information about what the survey asked customers… ." Similarly, with regard to the Market Insight survey D.03-10-088 finds "Pacific has modified the surveys over the years by changing its rating scale" which D.03-10-088 acknowledges makes it "extremely difficult to compare responses… ."[59] Finally, Pacific's IDC survey was identified by D.03-10-088 (and by Pacific) as providing results that "might not be statistically different from the results of other LECs."[60]

D.03-10-088's application of a double standard to ORA's survey data is summarized in the December 3, 2003, dissent in this proceeding. After an analysis of D.03-10-088's treatment of the evidence presented by the parties, the dissent states, "[w]ithout explanation, the majority applied a tough standard of 'statistical confidence' to ORA's survey comparisons, but failed to apply any standard to Pacific's survey comparisons." (Lynch Dissent, p. 10.) In addition to establishing a vague and unworkable standard for survey data, D.03-10-088's dismissal of ORA's survey and acceptance of Pacific's surveys is arbitrary and capricious.

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[58] D.01-12-021, mimeo at 17, fn.17.

[59] D.03-10-088, p.133.

[60] D.03-10-088, p. 128.

F. Verizon Provided Erroneous Data to the Commission

D.03-10-088 rejects ORA's claim that Verizon's data is erroneous. D.03-10-088 states, " We find that ORA's challenges to Verizon's data almost identical to their challenges to Pacific' s and suffer from the same deficiencies. We reject ORA's challenges to Verizon's data for essentially the same reasons." (D.03-10-088, p.59.) However, at no point in its discussion does D.03-10-088 identify any testimony or other evidence of record upon which its statements and findings are based.

Moreover, ORA's claims about Verizon's data are not identical to those raised by SBC's data. For example, among other things, ORA pointed out that the installation data provided under the mandate of D.00-03-021 is flawed because Verizon includes orders in that data for interexchange carriers. (ORA/Young, Tr. Vol.21, pp. 2501-2: 21-4.) Contrary to Verizon's practice, D. 00-03-021 requires Verizon to report all installation orders for residential service.[61] These orders would include all orders for local exchange services including basic service and vertical services, but not orders for interexchange carriers. Verizon's inclusion of interexchange carrier information renders the data less useful and doesn't comply with D.00-03-021. Similarly, ORA requested raw installation data from Verizon in data request LSY-QOS-Verizon-002 (for the years 1998-2001).[62] In the same data request, ORA asked Verizon how it calculates installation intervals. Verizon's response was incomplete in that it did not include discussion of its alleged "billing effective date." Indeed, Verizon only mentioned its "billing effective date" after ORA presented its testimony and Verizon offered no proof that the "billing effective date" in fact was used.[63]

Contrary to D.03-10-088's claims, ORA did not raise this issue with regard to SBC's data. D.03-10-088 cannot therefore reject this issue "for essentially the same

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[61] D.00-03-021, Appendix D.

[62] ORA/ Young, Exhibit 2B: 240

[63] ORA/Young, Exhibit 2B: 216

reasons" it rejected ORA's contentions about SBC's data. In the absence of any viable stated rationale, D.03-10-088's failure to address this issue is arbitrary and capricious.

V. CONCLUSION

For the foregoing reasons ORA recommends that rehearing be had on D.03-10-088.

Respectfully submitted,

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December 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document **"APPLICATION OF TOWARD UTILITY REFORM NETWORK AND OFFICE OF RATEPAYER ADVOCATES FOR REHEARING OF DECISION 03-10-088", R.01-09-001, I.01-09-002.**

A copy has been e-mailed on all known parties of record who have provided e-mail addresses. In addition, all parties have been served by first-class mail.

Executed in San Francisco, California, on the **8th** day of **December, 2003**.

/s/ SUE ANN MUNIZ

SUE ANN MUNIZ